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A TWAIL Engagement with Customary International Investment Law

Some Strategies for Interpretation

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1 Introduction

The intellectual movement of Third World Approaches to International Law (TWAIL) is now a well-established strand of critical thought within the international legal discourse. At its core, TWAIL unveils the hierarchical nature of the international legal system and undertakes critical investigations which unearth power relationships within the international community.[1] While nowadays some may argue that the term TWAIL or the reference to third world States is anachronistic, it is important to understand that TWAIL is not a reference to a particular geographical constellation in international law. This is all the more so if we consider that States traditionally grouped under the 'third world' heading have since changed the political, economic or social traits that originally earned them this categorisation.[2] Rather, TWAIL represents a perspective which is 'critical of the universalizing mission and occidental authority of Eurocentric international legal scholarship and practice',[3] and is not

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1 JT Gathii, 'The Promise of International Law: A Third World View' (2021) 36(3) American University International Law Review 377; JT Gathii, 'The Agenda of Third World Approaches in International Law' in J Dunoff & M Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP 2022) ch 7.

2 A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 203–4.

3 Gathii 2022 (n 1). For an additional commentary on the geographical counterparts of these categories, see JC Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' (2018) 7 Global Journal of Comparative Law 232.

necessarily tied to a geographical Statist space. This reflects first the non-homogeneous ideological make-up of States traditionally considered as belonging to the third world, as well as the fact that nowadays one may often find the wretched and the dispossessed among societies traditionally considered to be part of the Global North. Thus, members of the TWAIL intellectual movement may not always share a geographical space and yet be united in 'a sensibility and a political orientation'.[4]

Historically, there have been different ways that TWAIL scholars have chosen to engage with international law, varying from complete denunciations of the system to more constructive attempts to deploy existing legal structures with a view to enacting change.[5] In this chapter, I will sketch out a discussion of customary international law (CIL) interpretation as an example of constructive engagement with international investment law (IIL) from a TWAIL perspective. I will build on the existing TWAIL scholarship, which has engaged in criticism of IIL as a regime and of the theory of CIL as a source of international law (Section 2). Having outlined the existing critique, I will turn to a discussion of CIL interpretation as a potential tool for reconciling some of the harsh, but merited, criticism coming from the TWAIL perspective with a continued engagement with and reliance on international (investment) law.

First, relying on the example of the minimum standard of treatment of aliens (MST) – one of the oldest customary rules of the international investment regime – I will argue that interpretation plays a crucial role in the construction of customary rules and is central to their evolution and continued existence (Section 3). Having established this, I will move to my final argument as to how this awareness of the function of interpretation in CIL can help us constructively engage with IIL from a TWAIL perspective (Section 4). Here, I will outline strategies for interpretation which may be deployed from the TWAIL perspective in order to address the perceived problems in the regime of IIL. Put differently, I will argue that the awareness of what interpretation is and how it functions in CIL opens up new avenues for addressing problems within both particular customary rules and, more generally, international (investment) law. It is at the stage

[4] L Eslava & S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103, 104; See also K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16(2) Wisconsin International Law Journal 353.

[5] Bianchi calls this TWAIL's 'ambivalent posture towards international law', variously regarding international law as either the problem or the solution to the world's injustices. Bianchi (n 2) 207–8.

of interpretation of customary rules that particular criticism can be raised and potentially resolved. In this sense, interpretation is a tool that may be utilised to address and potentially improve upon problematic rationales underlying the rule or the larger system in which it operates. While this presents great emancipatory potential with regard to argumentative strategies that may be developed, it also has its limitations. An evaluation of the limitations of the argument as well as some summary observations are thus addressed in the conclusion (Section 5).

2 The Criticism of Customary International Investment Law from the TWAIL Perspective

It is not surprising to observe that TWAIL scholarship is very critical of the regime of IIL. The TWAIL intellectual tradition in international law originates from decolonisation. It is a school of thought which perceives the international legal system as one built on power disparity, exploitation, and unequal relations. On this understanding, international law as a system reflects the interests of powerful States, and these interests are deployed through various legal doctrines including the doctrine of CIL. Here CIL is considered problematic both generally as a category in the sources doctrine,[6] and more specifically on the level of individual customary rules.[7] These problems of CIL are set in the wider historical context which links the development of international law to the colonial encounter between European States and the violently colonised non-European world.[8] It is thus not surprising to find particularly strong criticism among TWAIL scholars aimed at the system of IIL, and the (customary) rules contained therein.[9]

Historically, one of the strongest concerted TWAIL efforts at both criticising and reforming the international economic legal order was the

[6] BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1, 4–12; GRB Gallindo & C Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16(2) Chin J Int Law 251; JP Kelly, 'Customary International Law in Historical Context: The Exercise of Power without General Acceptance' in BD Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 47; see also KJ Heller, 'Specially Affected States and the Formation of Custom' (2018) 112(2) AJIL 191.

[7] Kelly (n 6) 59–73 particularly focusing on the origins of the customary MST; A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 214.

[8] Anghie (n 7).

[9] M Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Trade Law and Development 203; M Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010).

New International Economic Order (NIEO).[10] This was an initiative of Third World States aided by TWAIL scholars aimed at reforming regimes such as the IIL via a concentrated legislative effort at the United Nations General Assembly. The initiative concerned a reformation of key areas such as foreign direct investment, the rules of nationalisation and expropriation, the criteria applied to compensation, and the fora for dispute settlement in this area.[11] While highly ambitious, this initiative was met with little success. Pushback from Western States as well as various complex forms of financial domination deployed in the international system undermined the reformative effort, and the battle for a NIEO was largely lost.[12] The limited success of the NIEO has spurred what some have called a second generation[13] of TWAIL scholars, more disenchanted with international law, and focused on uncovering its continuously hegemonic traits. It is among this scholarship that much of the criticism of the contemporary IIL system can be found.

A central trait of this criticism revolves around the underlying rationale of IIL. The assumption upon which IIL is constructed is that foreign investment is so essential to economic development that its operation must be facilitated by near absolute protection of the foreign investment/investor.[14] This assumption, however, remains contested among critical scholars, as case studies demonstrate that foreign investment can be hugely exploitative and damaging to host economies.[15] This has led Sornarajah to observe that while the potential of foreign investment to aid development must be recognised, the absolute protection of investment in international law enables 'the instrumentalism of free market fundamentalism' to fragment international law 'without paying heed to prescriptions of law relating to the environment, human rights or labour standards'.[16] Similarly, Odumosu has demonstrated that in the context of

[10] UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc A/RES/3281(XXIX); See also, M Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979).

[11] Bianchi (n 2) 213.

[12] See, however, Bianchi who argues that the NIEO effort yielded changes in the international law-making process by introducing the notion of soft-law, and introducing a relative vision of normativity in this respect. Bianchi (n 2) 214.

[13] A Anghie & BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chin J Int Law 78.

[14] Sornarajah 2011 (n 9) 204.

[15] J Linarelli, ME Salomon & M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 145–74.

[16] Sornarajah 2011 (n 9) 205.

investment dispute settlement, this overwhelming focus on investment protection has all but erased legitimate grievances of local populations affected by investments, and also significantly restricted the extent to which host States might balance the protection of foreign investment with the protection of other local interests.[17]

The criticism of the underlying rationale of IIL often goes hand in hand with a critique of its historical origin, as well that of specific customary rules operating in the system. For instance, Kelly traces the customary MST to early natural law doctrines on the freedom of commerce and the rights to hospitality and sociability of Vittoria and Grotius, developed to legitimise the extension of the European colonial empires and the exploitation of peoples and resources encountered in the process.[18] Similarly, Anghie unpacks the relationship between State responsibility and the customary MST to demonstrate that Western States re-established colonial relationships of power with former colonies through what was ostensibly neutral international law.[19] Thus, while the formal process of decolonisation got rid of colonial empires, legal doctrines formed in the colonial period survive today and perpetuate problematic logics in the contemporary context of international law. On this point, Pahuja persuasively demonstrates that in moments when the Third World attempted to dispute existing structures in international law (such as with the NIEO), this was met with a response by the First World, which claimed the universality of values so as to discredit attempted alternatives.[20]

A related criticism here is the structure of dispute settlement inIIL. Scholars have pointed out the asymmetry inherent in the fact that while foreign investors may bring suit against host States, the opposite is not true.[21] Moreover, the rationale inherent in many BITs, trade agreements, and customary rules automatically puts host States on the defensive should there be an attempt to limit foreign investment in favour of the protection of local environment or peoples.[22] The obvious counter-argument here is that States willingly admit foreign investment by signing BITs or trade agreements,

[17] IT Odumosu, 'The Law and Politics of Engaging Resistance in Dispute Settlement' (2007) 26 Penn State Int Law Rev 251.

[18] Kelly (n 6) 51–74.

[19] Anghie (n 7) 210–15.

[20] S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 102–71.

[21] Linarelli, Salomon & Sornarajah (n 15) 147; G Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines' (2016) 37(11) Third World Quarterly 1957, 1969.

[22] See, for example, the reasoning of the Tribunal in *Técnicas Medioambientales Tecmed, SA v Mexico* (Award of 29 May 2003) ICSID No ARB(AF)/00/2 [119–32].

thereby subjecting themselves also to potential dispute settlement and the application of (customary) investment law. However, this argument potentially neglects the larger socio-economic context in which this 'willingness' takes place. Moreover, often political elites in States which conclude foreign investment agreements do not, in fact, represent or purport to protect the rights of some local populations, and thus, the asymmetry grows. Investment dispute settlement treats the State as a unitary entity, and as such, the interests of different local communities which might be differently affected by a particular foreign investment project are all subsumed under it.[23]

Having briefly outlined the lines of criticism levelled at customary IIL from the TWAIL perspective, I now turn to a discussion of CIL interpretation as the next step in the argument.

3 The Interpretation of Customary International Investment Law

This section first outlines more generally the nature and role of interpretation in the context of customary international law, before turning to the more concrete example of the customary MST as an illustration of these more general observations.

3.1 What Constitutes Interpretation of Customary International Law

Legal interpretation is the process of determining the scope and content of legal rules. It can be distinguished from rule-identification, which is the act of establishing whether a legal rule exists. Thus, interpretation is the process of discerning or clarifying the meaning of an existing legal rule, and takes place when a general rule is applied to particular facts.

CIL interpretation is the process that takes place after a customary rule has been identified. Once a rule of CIL is identified for the first time through an assessment of State practice and *opinio juris*, its existence is not restricted to the moment where it was identified for the first time; rather it is a continuous one. When the same rule is invoked in subsequent cases before the same or a different judicial body, the judicial body does not usually go into the exercise of re-establishing that the rule in question is a customary one by reassessing State practice and *opinio juris*.[24] Instead, the rule is *interpreted*

[23] Odumosu (n 17) 265–99.

[24] See, for instance, *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, Dissenting Opinion of

within the given legal and factual context of the new case at hand. Moreover, outside of the dispute-settlement context, a customary rule does not only exist in the isolated moments when it is identified for the purposes of a particular case. Rather, its existence in the complex of international legal relations is also a continuous one. In this sense, interpretation allows us to account for the continued existence and operation of a customary rule. Within the timeline of existence of a CIL rule, interpretation takes place after the periods of formation and identification of the rule.[25] Identification yields a general rule of CIL, based on an inductive analysis of State practice and *opinio juris*.[26] It is important to note that a form of interpretive reasoning may also take place at this stage, in the sense of assessment of the relevant practice and *opinio juris*. The identification exercise includes choices in the selection of certain custom-formative practices over others in order to infer the general rule, as well as the choices in how we describe these practices which lead to the identification of the rule.[27] The reasoning employed in these choices and descriptions is by necessity interpretative. However, this is not an interpretation of a customary rule because this rule has not been confirmed to exist yet. Rather, what happens at the stage of identification is an evaluation of the evidence of State practice and *opinio juris* in order to assess whether they qualify for the purposes of establishing a customary rule and whether they in fact point to the existence of a customary rule.[28] Some scholars do employ the term 'interpretation' to also refer to the reasoning that takes place at the stage of identification.[29] However, a distinction must be maintained between what might be labeled as interpretation

Judge Tanaka, 183; *Arrest Warrant of 11 April 2000* (Congo *v* Belgium) (Judgment) [2002] ICJ Rep 3 [52–4]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [101–2, 204]; *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113]; See also, P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 241.

[25] For an earlier discussion of this concept of a CIL timeline, see N Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How Can We Learn from Domestic Interpretive Practices?' in P Merkouris, J Kammerhofer & N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 453, 458–61, <www.cambridge.org/core/services/aop-cambridge-core/content/view/630E681903F80296865C48617CCA5C14/9781316516898c21_453-480.pdf/role_of_domestic_courts_in_the_interpretation_of_customary_international_law.pdf>.

[26] Merkouris (n 24) 134–5.

[27] O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31(1) EJIL 235, 240–4.

[28] On this point, see for more details, ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 122, Conclusion 6, Conclusion 10.

[29] See, for instance, A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95(4) AJIL 757; N Banteka, 'A Theory of

at the stage of identification and what is interpretation in the strict sense of an existing CIL rule. This is because these two operations are substantively different with respect to both their content and their outcome. The reasoning employed at identification is concerned with questions about the relevance and weight to be given to evidence of State practice and *opinio juris*, and the outcome of this reasoning is a binary one – a CIL rule is either determined to exist or it is not. The reasoning employed in interpretation is concerned with the determination of the content of the CIL rule and how this rule applies to the case at hand, and this reasoning may have a variety of outcomes depending on the rule being interpreted and the legal and factual circumstances it is being interpreted in. It is only by distinguishing these two operations that we may adequately capture the fact that the interpretation manifests differently in the context of CIL, that it is subject to a different methodology than that of identification, and it performs specific functions.

A related consideration in this context is who interprets. Formally, international law does not allocate interpretive authority with a single entity. Depending on the circumstances, interpretive authority may lie with a court, a State, or even a non-governmental entity.[30] All these actors together form the epistemic community of international law, and as such contribute broadly to the way legal rules are interpreted.[31] Nevertheless, judicial interpretation holds a prominent role in international law.[32] In

Constructive Interpretation for Customary International Law Identification' (2018) 39(3) MichJInt'l Law 301; DB Hollis, 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (OUP 2015) 78.

[30] M Waibel, 'Interpretive Communities in International Law' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (OUP 2015) 147, 155–8; see also, Azaria who speaks of the interpretive authority of the ILC, D Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 171.

[31] See A Bianchi, 'Epistemic Communities' in J d'Aspremont & S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 251; Waibel (n 30) 147; I Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(2) MJInt'l Law 371. See also, Linderfalk who discusses various interpreters through the distinction between operative interpretation (performed by national courts, civil servants, military officials, diplomatic personnel, international courts and arbitration tribunals, international organisations, and other authorities empowered to decide on issues concerning the application of international agreements) and doctrinal interpretation (performed by scholars). U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 12.

[32] See R Mackenzie, C Romano & Y Shany (eds), *The Manual on International Courts and Tribunals* (2nd edn, OUP 2010); G Hernandez, 'Interpretative Authority and the International Judiciary' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (OUP 2015) 166.

the subsequent discussion I focus on judicial interpretation for two reasons. First, because in the practice of international law, questions of interpretation tend to arise in the context of disputes and be formulated with a judge or arbitrator in mind.[33] Put differently, the bulk of the judicial role in international law consists of interpretation.[34] In this regard, and without prejudice to the interpretation of CIL by other actors, examples of CIL interpretation are most likely to be found in the jurisprudence of courts and tribunals. Second, because in international law judicial decisions possess what has aptly been described as a 'centrifugal normative force' – other international legal actors tend to follow judicial reasoning, and judicial decisions can be 'substantively constitutive' of international law.[35] 'That normative effect is exacerbated when dealing with *unwritten* sources of law, in particular customary international law […]: there is no balancing between the text, its authors, and the interpreter in such situations, and the certainty of judicial reasoning holds and intrinsic appeal'.[36]

An examination of jurisprudence dealing with the interpretation of CIL indicates that interpretation performs two important functions in the continued existence of customary rules – a constructive/concretising function and an evolutive function.[37] The constructive/concretising function refers to the fact that interpretation is the process through which the content of general customary rules is fleshed out and specified. Customary rules are often formulated in broad terms, and require precisely the act of interpretation to arrive at more concrete findings of their content.[38] In this sense, it is through interpretation that we arrive at more specific sub-elements of a general customary rule, or more specific sub-obligations

[33] A Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in A Bianchi, D Peat & Windsor (eds), *Interpretation in International Law* (OUP 2015) 34, 41.

[34] Hernandez (n 32) 167.

[35] ibid, 166; See also, A Zidar, 'Interpretation and the International Legal Profession: Between Duty and Aspiration in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (OUP 2015) 133, 134; H Kelsen, *Pure Theory of Law* (UC Press 1967) 354–5.

[36] Hernandez (n 32) 166 [emphasis added]. See also, Waibel who discusses the centrality of judicial interpretation in international law with a particular focus on national courts as interpreters of international law. Waibel (n 25) 155–8.

[37] For an earlier discussion of these two functions, see P Merkouris & N Mileva, 'ESIIIL Reflection: Introduction to the Series "Customary Law Interpretation as a Tool"' (2022) 1I(1) ESIL Reflections 1 <https://esil-sedi.eu/wp-content/uploads/2022/08/ESIL-Reflection-Merkouris-Mileva.pdf> accessed 24 June 2023.

[38] S Sur, 'La créativité du droit international' (2013) 363 RdC 21, 295; A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496.

that flow from it. Merkouris also refers to this as the *collapsing* function of interpretation.[39] The evolutive function of interpretation refers to the fact that interpretation is crucial in the continued existence of CIL rules, and their adaptation to new developments of fact or law. Contrary to some views, customary rules are not static legal rules which have no place in modern legal systems.[40] Rather, customary rules are by their nature dynamic because they move together with the community from whose conduct they emerge. As such, they require interpretation in order to be able to respond to emerging new circumstances.[41] For an illustration of these two functions relevant to our present discussion, let us briefly consider the example of the customary MST.

3.2 The Interpretation of the Customary MST and the Functions of CIL Interpretation

The customary status of MST is uncontested, and support for this may be found widely among States, tribunals, and scholarly writings. What is, however, in question is its precise content.[42] As argued above, customary rules necessarily come in a general format, and the MST is one among many examples which confirms this. This is certainly both a virtue and a vice of custom. The generality of customary rules makes them particularly fit to answer to a variety of circumstances, and thus regulate a variety of situations that may arise in international law. In a scenario where multiple legal regimes might interact or bind different actors differently, general customary rules present a least common denominator of legal obligation. In the context of the MST, its customary status means that obligations flowing from it apply to all States, including those that may not have

[39] ibid.

[40] For a discussion on this, see CA Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 34; BD Lepard, 'Customary International Law as a Dynamic Process' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 62; O Sender & M Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 360; J Tasioulas, 'Customary International Law and the Quest for Global Justice' in A Perreau-Saussine & JB Murphy (eds), *The Nature of Customary International Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 307.

[41] On this point, see N Mileva & M Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in G Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (Hart 2019) 152.

[42] P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 97.

entered into any bilateral investment treaties (BITs), and may also be invoked by any foreign investor irrespective of whether or not their State of origin has entered into a BIT with the State where they've made an investment.[43] Moreover, in new legal situations not covered by conventional rules, customary law may prove a source of regulation that can be extended by analogy.[44] This is arguably what indeed happened with the customary MST, which had originally broadly applied to the treatment of aliens and was later also extended to the property of aliens as well as their investments. At the same time, the generality of customary rules also leads to vagueness, and this is a challenge to the legal certainty and predictability that actors might desire in particular legal scenarios or in international law more generally. The customary MST has indeed been criticised for its vagueness, its inability to provide clear standards for behaviour, and even its 'normative weakness'.[45]

Historically, the formulation of the MST is traced back to a 1910 address by the American Secretary of State, Elihu Root, who expressed the view that an international standard is necessary in order to guarantee appropriate treatment by host countries to the nationals of another country.[46] Root's formulation, however, was quite vague, and did not in fact provide for a more concrete content of the standard beyond a claim that such a standard existed and was recognised by civilised countries.[47] A more concrete expression of the content of the MST is ascribed to the US–Mexico Claims Commission in its *Neer* award.[48] Much like the formulation

[43] ibid, 96.

[44] See on this the reasoning of Germany with respect to customary rules applying to cyber operations. German Government, 'On the Application of International Law in Cyberspace – Position Paper' (*Auswärtiges Amt*, March 2021) <www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> accessed 26 July 2022.

[45] J d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in Gazzini, T & de Brabandere, E (eds), *International Investment Law: The Sources of Rights and Obligation* (Brill 2012) 5, 34.

[46] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proc 16, 21. 'There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world'.

[47] See on this the detailed analysis in M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 39–63.

[48] *USA (LFH Neer) v Mexico* (Award of 15 October 1926) 4 RIAA 60 [4]. See Patrick Dumberry also flags other contemporaneous cases as relevant to the emergence of the minimum standard. Dumberry (n 42) 65, referencing *USA (Harry Roberts) v Mexico* (Award of 2 November 1926) 4 RIAA 77; *France (Affaire Chevreau) v UK* (Award of 9 June 1931) 2 RIAA 1113; and *USA (Hopkins) v Mexico* (1926) 4 RIAA 41.

expressed by Secretary Root, however, the *Neer* award did not express the MST with the protection of foreign investments or property in view. Rather, it was concerned with the more specific scenario of alleged failure to investigate the murder of an alien, and the more general standard of denial of justice in the context of treatment of aliens.[49] Thus, while *Neer* is considered the classical starting point of MST, both States and tribunals have recognised that MST is not frozen in time to this formulation.[50] The shift from a more general standard of denial of justice to the more specific rationale of protection of foreign investment and property is not insignificant. As Paparinskis aptly demonstrates in his genealogy of the standard, in post-World War 2 discussions of the MST there is a marked 'shift of the paradigm that the standard was meant to regulate', including now a focus on property and the personality of the foreign investor.[51] This focus on the protection of property rights and protection of foreign investment is the primary area of application of the MST today.[52]

TWAIL scholarship has offered its own take on why this shift occurred.[53] What we are more concerned with for the purposes of this section is how these changes in perspective were operationalised in the standard by means of interpretation. As the upcoming discussion will demonstrate, while the customary MST was initially expressed in general terms, its content in the context of investment law has been made more concrete and specific through interpretation by various investment tribunals. Moreover, it is also through interpretation that the MST has evolved over time.

Early mentions of the MST as a customary rule relevant in the context of investment protection can be found in the reasoning of the ICJ in the *ELSI* case. Here, the court acknowledged that the relevant treaty standard of treatment 'must conform to the minimum international standard',[54] and found that this minimum standard includes the element of 'denial of

[49] Paparinskis (n 47) 48–54.

[50] See, for instance, the positions of both USA and Canada as expressed during the proceedings of *ADF Group Inc v USA*. *ADF Group Inc v USA* (Canada's Second Article 1128 Submission of 19 July 2002) ICSID Case No ARB(AF)/00/1 [8–10]; *ADF Group Inc v USA* (Transcript of Hearing: Day 2 of 16 April 2002) ICSID Case No ARB(AF)/00/1, 492–3.

[51] Paparinskis (n 47) 64, 65–7. See also the discussion in the ILC on State responsibility, discussing also an international standard in relation to the protection of property of aliens. ILC, 'Summary Records of the 8th Session' (23 April–4 July 1956) [1956/1] YBILC 1, 233–8.

[52] H Dickerson, 'Minimum Standards' [2013] MPEPIL 845 [12–13].

[53] See discussion in Section 2 above.

[54] *Case concerning Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] ICJ Rep 15 [111]. This makes sense in light of the fact that the relevant treaty provision provided for 'the full protection and security required by international law'.

procedural justice'.[55] The reasoning of the ICJ with regard to the denial of procedural justice as an element of the customary MST has been referenced by various investment tribunals similarly faced with the need to specify the content of the general customary standard. For instance, in its award in respect of damages, the *Pope and Talbot* Tribunal relied on the reasoning in *ELSI* when seeking to define the arbitrariness requisite for a finding of denial of justice as part of the MST.[56] In *Mondev International Ltd*, this reference was part of a broader interpretation of the customary MST. Here, the Tribunal began by decoupling the customary MST in the context of investment protection from the minimum standard broadly outlined in *Neer*.[57] It then proceeded to interpret the customary MST evolutively so as to account for changes of law that have taken place in the broader legal environment in which the rule operates.[58] While this may, at first glance, seem expansive, it is interesting to note that the Tribunal also acknowledged the limitations of its interpretive power, and professed to remain within the limits posed by the customary MST.[59] After examining the relevant legal developments in the period since *Neer*, the *Mondev* Tribunal came to the conclusion that under the customary MST investments are entitled to fair and equitable treatment and full protection and security.[60] Having outlined the content of the customary MST in this way, the Tribunal went on to examine the applicable standard of denial of justice which would render treatment unfair or inequitable. Here it relied, among other, on the reasoning of the ICJ with respect to the nature of arbitrariness as a denial of justice, and accepted the ICJ definition of arbitrary conduct 'as that which displays a willful disregard of due process of law, … which shocks, or at least surprises, a sense of judicial propriety'.[61] In addition to the ICJ's reasoning in *ELSI*, the *Mondev* Tribunal also relied

[55] ibid. In the particular circumstances, however, the court found that the temporal delay in proceedings complained by the applicant did not amount to such a denial. ibid [112].

[56] *Pope & Talbot Inc v Canada* (Award in Respect of Damages of 31 May 2002) UNCITRAL [63].

[57] *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113–15].

[58] ibid [116]. '[…] In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious'.

[59] ibid [119–20].

[60] ibid [121–5].

[61] ibid, referring to *Elettronica Sicula SpA (ELSI)* [128].

on the *Azinian* Tribunal for an even more detailed interpretation of denial of justice, thus also accepting into its definition elements such as refusal to entertain a suit, undue delay, inadequate administration of justice and malicious misapplication of the law.[62]

I flag this cross-reference to the reasoning of other tribunals because it is illustrative of the role of judicial interpretation in the construction of both customary rules more generally and the customary MST more specifically. In light of the general nature of CIL, it is not at all surprising that courts will borrow from each other when interpreting rules in *pari materia*. What is noteworthy in this cross-referencing is that the interpretive reasoning does not remain limited to the particular case, but carries over to subsequent cases as well. It is attached to the rule beyond the context of the specific case in that it has specified the content which is now considered to be an expression of the rule. In this sense, interpretation affects the content of the customary rule more generally as it exists continuously in international law. We may similarly observe this in the reasoning of the *Loewen Group Inc* Tribunal, which relied on the reasoning in *Pope & Talbot*, *ELSI* and *Mondev* to elucidate what would constitute arbitrariness amounting to a denial of justice in breach of the customary MST.[63] The constructive role of interpretation is illustrated perhaps most strongly by the reasoning of the Tribunal in *Waste Management*. Here, having surveyed the previous jurisprudence of a number of investment tribunals, the *Waste Management* Tribunal arrived at the following finding:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[64]

[62] *Azinian v Mexico* (Award of 1 November 1999) ICSID Case No ARB(AF)/97/2 [99–103].
[63] *Loewen Group, Inc and Raymond L Loewen v USA* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3 [131–3].
[64] *Waste Management, Inc v Mexico* ("Number 2") (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [98].

The Tribunal here comes up with a very specific definition of the customary MST as a set of concrete elements and obligations. I would argue that this kind of construction of the customary MST, as a general rule made up of various specific legal sub-obligations, is a product of interpretation. This is certainly not an entirely novel observation, as several authors have made similar claims as to the 'umbrella-like' character of MST.[65] Building on their observations, I would merely argue more specifically that it is through interpretation particularly that the content of the general customary MST was developed and concretised. Why this is important is because this act of concretisation through interpretation does not remain restricted to the case at hand, but carries over to reasoning in subsequent cases both before the same tribunal and others that might follow it. Thus, we may envisage a general customary rule in case A whose content gets concretised through interpretation to contain element A1, where that element is carried over to the subsequent case B. Should further concretisation through interpretation take place in case B, whereby the customary rule is found to also contain element B1, elements A1 and B1 would now carry over to subsequent case C, and so on. In this way, interpretation affects the content of general customary rules not only for purposes of one specific case but also throughout the continuous existence of that customary rule overall and generally in international law. That this transcends adjudication becomes evident when we consider that often States rely on earlier judicial reasoning to argue the content of customary rules in subsequent cases. Thus, this constructive function of interpretation finds its way into State practice as well, thereby penetrating the very process of custom-creation by States.[66]

While this brief analysis of case law demonstrates how the customary MST has evolved and been constructed through judicial interpretation, this trend has not gone without criticism. For one, scholars have noted that this form of development of the standard through a case-by-case

[65] P Dumberry, 'Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status' (2017) 1(2) Brill Research Perspectives in International Investment Law and Arbitration 1, 17–18; See also, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009); Paparinskis (n 47).

[66] Giannakopoulos and Monga refer to this as a 'feedback loop'. C Giannakopoulos & M Monga, 'History as Interpretative Context in the Evolutionary Interpretation of FET in International Investment Law' in G Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (Hart 2019) 297, 308.

application is not coherent and may lead to discrepancies in the way the standard is applied and enforced.[67] Furthermore, scholars have criticised this expansion through interpretation for developing investment protection obligations which arguably do not flow from the customary standard or the conduct of States.[68] For instance, several awards have read into the standard a requirement for a stable and predictable regulatory environment owed to investors,[69] which does not necessarily flow from the customary MST.[70] Similarly, and relying on the conviction that the customary MST should be interpreted evolutively,[71] the *Bilcon* Tribunal also found that the standard requires a 'fair opportunity for review' to be extended to the investor,[72] which once again is not obvious from the customary MST. On this critical note, it has also been observed that in the context of NAFTA proceedings there is a conflation of the customary MST with the treaty standard enshrined in Article 1105 NAFTA.[73] Thus, tribunals often make interpretive findings concerning the customary MST by relying on the treaty standard and relevant rules for treaty interpretation, which is problematic.[74] Nevertheless, it has been observed that the content of the standard is likely to continue being 'created through the dispute-settlement process',[75] and no universal international codification

[67] Dickerson (n 52) [23].

[68] JH Fahner, 'Maximising Investment Protection under the Minimum Standard – A Case Study of the Evolutive Interpretation and Application of Customary International Law in Investment Arbitration' (2023) 12(1) ESIL Reflections 1 <https://esil-sedi.eu/esil-reflection-maximising-investment-protection-under-the-minimum-standard-a-case-study-of-the-evolutive-interpretation-and-application-of-customary-international-law-in-investment-arbitration-2/> accessed 24 June 2023.

[69] See, for instance, *Windstream v Canada* (Award of 27 September 2016) PCA Case No 2013–22 [379]; *Eco Oro Minerals Corp v Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) ICSID Case No ARB/16/41 [805–21].

[70] Fahner (n 68).

[71] *Bilcon v Canada* (Award on Jurisdiction and Liability of 17 March 2015) PCA Case No. 2009–04 [433–6].

[72] ibid [603].

[73] The pertinent portion of the North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289, Art 1105 is: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'. In an interpretative note issued in 2001, NAFTA parties clarified that Art. 1105 prescribes the customary MST as the relevant standard of treatment to be afforded to investments, that this standard includes fair and equitable treatment and full protection of security, and these latter two do not require treatment in addition to or beyond the customary MST.

[74] See on this point Fahner (n 68) criticising the reasoning in *Pope & Talbot* in these terms.

[75] Dickerson (n 52) [23].

or clarification effort seems imminent.[76] Bearing these observations in mind, let us now turn to a discussion of how these traits of interpretation in the context of CIL rules may be conducive to a TWAIL engagement with customary IIL.

4 A TWAIL Approach to the Interpretation of Customary International Investment Law

In outlining a potential TWAIL approach to the interpretation of customary international investment law, I join the chorus of critical scholars who have taken the proverbial good with the bad in attempting to devise critique without dismissing international law as a whole. This, I believe, reflects what Sundhya Pahuja has aptly named a 'critical faith' – maintaining faith in international law despite firmly comprehending its problematic complicity with power.[77] At the centre of such an engagement with international law lies the need to deconstruct international law's claim to universality in order to trace problematic elements and potentially resolve them. This entails recognising 'both the contingency of any value put forth as universal and the frame of reference supporting the universal claim'.[78] This I would argue is a task that can be achieved at the stage of interpretation. With this in mind, this section outlines three potential strategies which rely on the constructive and evolutive functions of interpretation in the context of CIL. These strategies represent modes of engagement with customary international investment law from the TWAIL perspective which rely on interpretation in order to draw out and address the problems inherent in the law, without dismissing the system as a whole. They represent what Georges Abi Saab has humorously dubbed 'operating behind enemy lines' – a mode of engagement with problematic aspects of international law premised on the understanding that it is better to attempt change from within than from outside.[79]

One might question the value of engaging with international investment law from a TWAIL perspective in this 'internal' way. The benefit of this kind of engagement lies in the opportunity to engage familiar professional

[76] However, see Dumberry discussing Article 8.10 of the EU-Canada Comprehensive Economic and Trade Agrement (CETA) as bypassing the uncertainty inherent in the customary MST by codifying particular obligations which ostensibly derive from the customary standard. Dumberry (n 65) 42–45.
[77] Pahuja (n 20) 1.
[78] ibid, 260.
[79] Abi-Saab (n 21) 1957.

language that is intelligible to the broader 'target audience' (courts, lawyers, States, scholars). Moreover, it also lies in the power to speak and be heard that comes from remaining within an arena of discussion rather than abandoning it.[80] This type of TWAIL engagement with international law capitalises on the existing structures in order to deploy what might be considered a subversive argument aimed at the amelioration of perceived biases. At the same time, it is important to acknowledge that professionals participating in international legal argumentation have a responsibility of maintaining what has been dubbed a 'methodological honesty' in their development of arguments concerning the content and purpose of international legal rules. The persuasiveness of any legal argument depends upon maintaining the idea of international law as a formal system according to which answers to legal questions can be derived from sources and principles whose validity depends on the internal logic of the system.[81] In this sense, the interpretive strategies suggested below are not attempts to argue in bad faith or misrepresent existing legal rules. Rather, the objective is to explore avenues of argumentation that promote the interpretation of customary rules in a way that accounts for their historically problematic origin and promotes their re-construction in a manner consistent with contemporary developments and values in the broader system.

The interpretive strategies suggested below are informed, amongst others, by the regime bias approach (alternatively also called the regime bias *critique*) developed by TWAIL scholars engaged with the various legal regimes of international economic governance.[82] The regime bias approach is aimed at uncovering how rules of the legal regimes making up the international economic order are constructed in a way that disempowers particular members of the system, inconsistently with the 'liberal promise of even-handedness'.[83] This approach looks particularly at the way rules of international trade, commerce, and investment are

[80] See, for instance, BS Chimni, 'Third World Approaches to International Law: A Manifesto' in A Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill 2003) 47.

[81] R Collins & A Bohm, 'International Law as Professional Practice: Crafting the Autonomy of International Law' in J d'Aspremont et al (eds), *International Law as a Profession* (CUP 2017) 67.

[82] JT Gathii, 'Third World Approaches to International Economic Governance' in R Falk, B Rajagopal & J Stevens (eds), *International Law and the Third World* (Routledge 2008) 255; G Van Harten, 'TWAIL and the Dabhol Arbitration' (2011) 3(1) Trade, Law and Development 131; AR Hippolyte, 'Correcting TWAIL's Bind Spots: A Plea for a Pragmatic Approach to International Economic Governance' (2016) 18 ICLR 34.

[83] Gathii (n 82) 255–6.

construed, and identifies a differential manner in which the rules are interpreted and applied when the interests of the Third World are at stake.[84] Some of the main insights of the regime bias approach include the observation that international law is not a neutral and objective set of rules but rather an instrument employed in the context of power relations, and the finding that international institutions may interpret and apply international law in ways that are systemically biased against Third World interests.[85] For instance, using the example of the Dabhol investment arbitration before the International Chamber of Commerce (ICC), Van Harten argues that the ICC construed its role broadly to include not only arbitration on the basis of the pertinent investment contract but also what was in effect a review of domestic regulatory choices and a disciplining of constituencies in the Third World.[86] While the main contribution of the regime bias approach is critical, scholars have also used its rationale to propose reform within the international investment regime. For example, Hippolyte advocates for Third World countries to develop their own BIT models, which would focus on modes of investment attuned to their particular concerns, or to establish alternative regional investment arbitration centres.[87] Similarly, Odumosu flags mechanisms within investment arbitration proceedings such as the *amicus curiae* brief or public interest arguments, which may be a way for subaltern voices to be heard and considered in the otherwise insular investment proceedings.[88]

The regime bias approach is instructive because it demonstrates the inherent plasticity of legal rules, which becomes apparent at the stage of interpretation. It counters the image of a stable and neutral international investment law regime and reveals some of the biases which are woven into rules during the act of interpretation. Thus, the regime bias approach does not only shed light on certain problematic rationales operating in the investment law regime but also flags interpretation as a viable 'entry point' for TWAIL counter-arguments and resistance. Bearing in mind that throughout the analysis in this chapter I have focused on judicial interpretation and the function of interpretation in the dispute settlement context, the strategies sketched below are focused primarily on interpretation in dispute settlement and operate differently depending on one's

[84] Van Harten (n 82) 147–60.
[85] ibid, 137.
[86] ibid, 148–60.
[87] Hippolyte (n 82) 50–2.
[88] Odumosu (n 17) 271–87.

positionality in the process.[89] In this sense, they are also differentially suitable for different actors who might want to engage with international law from the TWAIL perspective.

The first possible strategy in the context of CIL interpretation is advancing evolutive interpretative claims which push for a reconsideration of the rule's content in light of factual or legal changes in the broader normative environment in which the rule operates. Depending on the rule in question, this would entail different argumentative strategies. For instance, when advancing an evolutive interpretative claim for the customary MST, this type of engagement consists of answering two connected questions: (i) can an argument be made that there is a need to interpret the rule dynamically in order to capture a change in the legal environment in which the rule operates? and (ii) are there competing rationales that may be taken in consideration and affect the interpretation of the rule accordingly? In relation to the first question, in the context of the customary MST, it has been argued persuasively that given the generality of the rule the elements which form part of its content are inherently dynamic and as such require evolutive interpretation.[90] Claims for evolutive interpretation may thus persuasively be made any time it can be shown that there is a need to interpret the rule dynamically in order to capture a change in the relevant standards or normative environment in which the rule operates. Answering question two entails, as a first step, recognising and stating plainly the rationale that the customary MST is driven by. This rule is largely focused on the protection of foreign investment, premised in turn on the ideology of economic development. Recognising this enables us to situate the historical development of the rule and understand how it has come to be what it is today. Having done that, we are able to evaluate how the rule plays out in the modern context, and which claims regarding its evolution are likely to work. Are there competing rationales – such as, for instance, the protection of the environment or human rights – that may be taken into consideration and that affect the interpretation of the rule accordingly? These may be found in other regimes as relevant treaty rules

[89] See on this point Georges Abi-Saab: 'The interpretative operation yields a final product, also referred to as "interpretation", consisting of a rendering of the meaning of the interpreted text. In evaluating the "authority" of this final product, ie, the weight it carries in the eyes of the community, particularly the legal community, one has to keep in mind the interpreter's status and position: interpretation by whom and for what purpose?'. G Abi-Saab, 'Introduction: A Meta-Question' in G Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (Hart 2019) 7, 10.

[90] Giannakopoulos & Monga (n 66) 303–4.

applicable between the parties, or in competing customary rules which have developed later than the customary MST and afford protection to, for instance, the environment or indigenous peoples. Interpretation entails, amongst other things, a balancing exercise,[91] and as such, it is capable of striking a balance between the rationale of economic development and these competing interests and competing rationales.

In the context of this strategy of engagement, interpretation functions as a sort of controlled 'arguing space' wherein competing argumentative strategies are deployed. This strategy is suited to TWAIL advocates and practitioners participating in relevant litigation. The limits here are of course the forum in which one attempts to advance evolutive interpretative claims, as well as the instructions of the party one is representing. For example, with respect to the limitation posed by the forum, it has been observed that certain formats of investment arbitration, such as ICSID arbitration, are inherently tilted in favour of the protection of foreign investors.[92] Thus, attempting to argue for evolutive interpretation, which balances the protection of investors with the protection of say the environment or indigenous groups, may not always be successful. With respect to the limitation posed by the party one is representing, it has been observed that the arguments deployed by, for instance, counsel representing States are limited in scope and content by the previous consultations and instructions of their client.[93] In this regard, any TWAIL arguments advanced by counsel on behalf of a State would be limited accordingly. Another relevant consideration here is that sometimes strategic engagement with litigation in this way may lead to adverse effects if the proposed interpretation is not accepted by courts.[94] Thus, for instance, an

[91] J Paine, 'The Judicial Dimension of Regime Interaction beyond Systemic Integration' in S Trevisanut, N Giannopoulos & R Roland Holst (eds), *Regime Interaction in Ocean Governance: Problems, Theories and Methods* (Brill 2020) 184.

[92] Abi-Saab argues that 'In contrast to the WTO […] when it comes to ICSID arbitrations, the enemy is clearly there. Not only is the procedure tilted in favor of foreign investors (for example, they can initiate arbitration against the host State, but the reverse is not possible), but so are also a good majority of the players in the system, who do not hesitate grossly to misinterpret the rules of international law to suit their private purposes.' Abi-Saab (n 19) 1969.

[93] J Batura, J Hettihewa & P Kulish, '"I resigned because Russia had become an absolutely indefensible client": an Interview with Alain Pellet' (*Völkerrechtsblog*, 4 July 2022) <https://voelkerrechtsblog.org/de/i-resigned-because-russia-had-become-an-absolutely-indefensible-client/> accessed 25 July 2022.

[94] See on this point T Sparks, N Nedeski & G Hernández, 'Judging Climate Change Obligations: Can the World Court Rise to the Occasion? Part II: What Role for International Adjudication?' (*Völkerrechtsblog*, 30 April 2020) <https://voelkerrechtsblog.org/judging-climate-change-obligations-can-the-world-court-raise-the-occasion-2/> accessed 25 July 2022.

unsuccessful argument for evolutive interpretation may lead to a consolidation of the undesirable content of the rule.

An alternative to this strategy would be the strategy of arguing for a restrictive interpretation of a CIL rule. In the context of the customary MST, this would entail arguing for a stringent customary standard of treatment which has a high threshold of breach. This may involve similar argumentative strategies to the ones described above, only deployed in the 'opposite direction'. More specifically, it may involve argumentative strategies which hark back to the older *Neer* standard and early investment arbitration which maintained it, arguing for a limitation of the customary standard to the high threshold described therein. These argumentative strategies may rely on exo-legal findings which show that expanding investment protection in the past has been to the detriment of local communities, and has potentially violated standards of environmental protection, or human and labour rights.[95] In this context, they may argue that a stringent customary standard, coupled with a balancing exercise, which considers rationales such as public policy or the protection of the local environment or communities, yields a narrow interpretation of the customary MST and the rights and protections extended to the investor. Alternatively, they may rely on a doctrinal positivist argument arguing that the expansion of the customary MST through interpretation is illegitimate and inconsistent with State practice. In this regard, it has been argued, for instance, that arguments which attempt to draw a uniform standard from widespread investment treaties as a form of State practice are unsubstantiated because while these treaties are many in number, their content as to the treatment of investors is varied and fails the uniformity requirement for CIL.[96] This strategy may be particularly fit for TWAIL advocates or governmental advisors who are representing or advising States.

A final strategy in the context of CIL interpretation is what I would call 'interpreting against the grain'. This strategy consists of devising innovative arguments as to the (re)interpretation of general customary rules, with a view to forwarding a new rationality previously unexplored in the rule.[97]

[95] See as an example of this strategy the argument developed by Sornarajah (n 9) 208.

[96] ibid, 225–6.

[97] See, for example, Sparks, Nedeski and Hernández who argue that '[i]n the context of catastrophic climate change legal analysis must understand State responsibility collectively: as *shared responsibility*', and thus, argue for an interpretation of the no-harm rule which imposes more demanding obligations on states for their share in global emissions. T Sparks, N Nedeski & G Hernández, 'Judging Climate Change Obligations: Can the World Court Rise to the Occasion? Part I: Primary Obligations to Combat Climate Change' (*Völkerrechtsblog*, 30 April 2020) <https://voelkerrechtsblog.org/judging-climate-change-obligations-can-the-world-court-raise-the-occasion/> accessed 25 July 2022.

In this context, one can rely on existing CIL doctrine more generally and the customary MST more specifically and utilise some of its inherent plasticity[98] to argue for a possible remoulding of the content. Interpretation here opens a sort of 'reasoning space' in which the problematic origin of a rule can be scrutinised and interpretive arguments deployed to resolve it. Can certain past practices and rationalities withstand modern scrutiny when placed against contemporary values espoused in the system? This is one of the central questions that may be asked when an older general customary rule such as the MST is being interpreted in the modern context. The resulting answer is a normative argument which might claim that the protection of investment to the detriment of the environment or human wellbeing is incompatible with contemporary values. A similarly plausible argument in this vein would be that the unitary notion of Statehood inherent in the construction of the investor-State relationship is incompatible with the heterogeneous make-up of States, which often comprise of different communities with varying interests.[99] This strategy would best fit a TWAIL scholar who develops their argument from the position of scholarship.[100] On this point, an important caveat is that 'the authority of scholars is not an institutional, procedural, or social one, but purely an epistemic one'.[101] The authority of interpretative arguments developed by scholars is limited accordingly.

This strategy may also be suited to an NGO or grassroot movement which has been granted the right to appear as *amicus curiae* in the context of an investment arbitration. For instance, in the context of ICSID proceedings, pursuant to Rule 37(2) of the Rules of Procedure for Arbitration Proceedings, a non-disputing party may be granted a right to intervene in the proceedings. This kind of intervention is meant to 'assist the Tribunal in the determination of factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties'.[102] Similar provision for non-disputing

[98] The 'inherent plasticity' of CIL is a term borrowed from the work of Chasapis Tassinis, and refers to the ability of custom to be molded into different shapes and lead to rules of different scope, without the need to add new state practice and *opinio juris* to the pool of evidence each time. Chasapis Tassinis (n 27) 248–55.

[99] Odumosu (n 17) 269.

[100] See, for example, the call of BS Chimni for a 'postmodern approach' to custom. Chimni (n 6).

[101] A Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24(2) EJIL 533.

[102] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (adopted 25 September 1967, entered into force 1 January 1968) Rule 37(2)

party intervention is made in the context of NAFTA proceedings.[103] This represents the opportunity to inject subaltern voices into the proceedings when their interests are otherwise not represented by the State. Using the tool of a non-disputing party intervention, actors may put forward interpretive arguments which highlight the asymmetry inherent in the investor-State relationship, and the adverse effects this has to the rights and interests of local communities. This strategy is of course limited by the tribunal's willingness to grant standing to non-disputing parties, as well as the scope of such participation.[104] For instance, the *Glamis Gold* Tribunal allowed the Quechan Indian Nation to submit their views as a non-disputing party because it felt that the submission would not cause an undue burden or delay.[105] On the other hand, the *Pezold* Tribunal rejected indigenous participation on the reasoning that the rights of indigenous communities fell outside of the scope of the dispute and that allowing for such participation may unfairly prejudice the claimant (investor).[106] Moreover, it has been argued that even if such participation is granted, the extent to which an investment tribunal would seriously consider the interests of subaltern communities is limited.[107]

A tangential opportunity to the one described here is in the training and education activities undertaken by a TWAIL scholar. For instance, in response to TWAIL scholarship, which has called for a conceptual change in the CIL doctrine, d'Aspremont has argued that a more fruitful avenue to pursue this change would be in the early stages of legal education, by targeting the production of ideas and beliefs about customary international law. The objective here would be to use the malleability of the CIL doctrine to empower scholars and practitioners of the periphery to develop persuasive subversive arguments.[108]

[103] FTC, 'Statement of the Free Trade Commission on Non-Disputing Party Participation' (*FTC*, 7 October 2003) <www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf> accessed 25 July 2022.

[104] For instance, Rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings indicates that 'After consulting both parties, the Tribunal *may* allow a person or entity […] to file a written submission' and that such a submission may not 'disrupt the proceeding or unduly burden or unfairly prejudice either party'. ICSID Rules of Procedure for Arbitration Proceedings (n 102) Rule 37(2).

[105] *Glamis Gold, Ltd v United States* (Decision on Application and Submission by Quechan Indian Nation of 16 September 2005) UNCITRAL [11–13].

[106] *Pezold v Zimbabwe* (Procedural Order No 2 of 26 June 2012) ICSID Case No ARB/10/15 [48–63].

[107] Odumosu (n 17) 256–7.

[108] J d'Aspremont, *The Discourse on Customary International Law* (OUP 2020) 84–7. In particular, d'Aspremont argues that '[i]nstead of striving to reinvent the doctrine of

5 Concluding Observations

This chapter has presented an idea for a constructive TWAIL approach to the interpretation of customary international investment law. This idea reflects the view that while there is a lot of relevant and legitimate criticism against the existing system of international investment law, desired change cannot be achieved if one completely dismisses the existing system. Thus, I have sketched out the so-called interpretative strategies which rely on existing structures in international law in order to affect systemic change. The argument developed here is an attempt to reconcile some of the harsh but merited TWAIL criticism with a continued engagement with the existing system of international law.

This argument also has its limitations. First, the conclusions reached in Section 3 with respect to the constructive function of interpretation in the context of the customary MST are preliminary, insofar as they were reached on the basis of a small exploratory sample of investment arbitration cases. In this sense, the conclusions can and should be tested on a broader sample of cases, as well as through examples of other customary rules.[109] Second, as the discussion in Section 4 illustrates, the strategies for interpretation as potentially deployed from the TWAIL perspective are limited by the role and position of the actor who is trying to deploy them. Finally, the strategies proposed here cannot address all the criticism levelled from the TWAIL perspective. The proposals made in Section 4 are limited to issues which arise, may be argued, and potentially resolved at the stage of interpretation.

customary international law, we must invest in strategies that draw on the malleability and fluidity of the current doctrine of customary law and facilitate the types of argumentation that "de-centre" the First World'.

[109] See, however, an analysis with similar conclusions about the constructive role of interpretation with respect to the customary rule of prevention. N Mileva, 'The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention' (*TRICI-Law Research Paper Series 010/2020*, 2020) <https://tricilawofficial.files.wordpress.com/2021/06/mileva_rps-010-2020.pdf> accessed 25 July 2022.